Towards an EU law on health-care services?

EFTA seminar on services

Brussels, 6 December 2006

Willy Palm
Dissemination development Officer
Towards an EU law on health-care services?

Outline

• Legal framework on cross-border care cover

• The ECJ case law 1998-2006

• The political process around health services

• Challenges for a future initiative on health services
Health systems and EU law

Social security

Public health

Health care
Article 152 EC Treaty

1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.

Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education.

(...)

5. Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care. In particular, measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.
Health systems and EU law

FREE MOVEMENT

Social security

Health care

Public health

Social security coordination
Social security coordination

- EC Regulations 1408/71 and 574/72
  - Occasional care (E111)
  - Planned care (E112)

- Recently modernised by EC Regulation 883/2004

- Rules regarding access to health care
  - Where and under what conditions an entitlement to health care is opened in another Member State?
  - Which legislation determines the scope and modalities of these entitlements?
  - Who will have to cover for the costs?
“Another piece of Europe in your pocket”

A health insurance card which will, on top of all other objectives, foster intra-EU mobility
<table>
<thead>
<tr>
<th>EHIC - Care which becomes medically necessary during their stay: if covered under the delivering-state system</th>
</tr>
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<tbody>
<tr>
<td>E112 - prior authorisation cannot be refused if:</td>
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<td>o treatment is covered in home state</td>
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<td>Financial settlement between States</td>
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### Cost of cross-border care per capita

<table>
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<tbody>
<tr>
<td></td>
<td>€</td>
<td>€</td>
<td>€</td>
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<td>€</td>
</tr>
<tr>
<td>Austria</td>
<td>-</td>
<td>0,48</td>
<td>1,87</td>
<td>8,90</td>
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<tr>
<td>Belgium</td>
<td>3,62</td>
<td>8,93</td>
<td>8,93</td>
<td>4,38</td>
<td>6,42</td>
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<tr>
<td>Switzerland</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>10,02</td>
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<tr>
<td>Germany</td>
<td>1,77</td>
<td>1,83</td>
<td>2,08</td>
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<td>Spain</td>
<td>0,33</td>
<td>1,48</td>
<td>1,03</td>
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<td>3,72</td>
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<td>France</td>
<td>0,79</td>
<td>1,87</td>
<td>1,21</td>
<td>1,05</td>
<td>5,79</td>
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<tr>
<td>Greece</td>
<td>0,95</td>
<td>2,51</td>
<td>2,68</td>
<td>3,15</td>
<td>0,79</td>
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<tr>
<td>Italy</td>
<td>2,99</td>
<td>8,36</td>
<td>3,52</td>
<td>2,89</td>
<td>2,26</td>
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<tr>
<td>Luxembourg</td>
<td>58,01</td>
<td>149,55</td>
<td>135,29</td>
<td>116,0</td>
<td>130,33</td>
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<tr>
<td>Netherlands</td>
<td>1,95</td>
<td>0,26</td>
<td>1,98</td>
<td>2,85</td>
<td>2,63</td>
</tr>
<tr>
<td>Portugal</td>
<td>0,82</td>
<td>3,76</td>
<td>6,81</td>
<td>7,00</td>
<td>3,85</td>
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<tr>
<td>Slovenia</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0,99</td>
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<tr>
<td>Sweden</td>
<td>-</td>
<td>-</td>
<td>0,65</td>
<td>0,96</td>
<td>1,92</td>
</tr>
<tr>
<td>UK</td>
<td>0,33</td>
<td>1,61</td>
<td>1,92</td>
<td>0,36</td>
<td>0,76</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,31</strong></td>
<td><strong>2,95</strong></td>
<td><strong>2,37</strong></td>
<td><strong>1,99</strong></td>
<td><strong>2,74</strong></td>
</tr>
</tbody>
</table>

Requests and authorisations for care abroad annually (2000, 2001)

<table>
<thead>
<tr>
<th>Country</th>
<th>E112 persons</th>
<th>E112 amount</th>
<th>% authorisations granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>B</td>
<td></td>
<td>13.249.821 €</td>
<td></td>
</tr>
<tr>
<td>DK</td>
<td>75</td>
<td></td>
<td></td>
</tr>
<tr>
<td>E</td>
<td>651</td>
<td></td>
<td></td>
</tr>
<tr>
<td>F</td>
<td>263</td>
<td></td>
<td>64%</td>
</tr>
<tr>
<td>I</td>
<td>16.280</td>
<td>49.952.314 €</td>
<td>91,50%</td>
</tr>
<tr>
<td>IRL</td>
<td>600</td>
<td>7.000.000 €</td>
<td>90%</td>
</tr>
<tr>
<td>L</td>
<td>11.506</td>
<td>24.513.299 €</td>
<td>97,90%</td>
</tr>
<tr>
<td>O</td>
<td>850</td>
<td>4.724.000 €</td>
<td></td>
</tr>
<tr>
<td>P</td>
<td>246</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FIN</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>1.134</td>
<td></td>
<td>77,60%</td>
</tr>
</tbody>
</table>

No data: NL, SW, D, GR

Commission staff working paper, July 2003
Health systems and EU law

- **FREE MOVEMENT**
  - Social security coordination
  - Free movement of medical goods
  - Free provision of healthcare services
  - Health care
  - Public health
  - Social security

Limitations justified on grounds of public policy, public security or public health.
The cases Kohll and Decker
ECJ rulings on patient mobility

- C-120/95 (*Decker*) and C-158/96 (*Kohll*)
- C-368/98 (*Vanbraekel*)
- C-157/99 (*Geraets-Smits and Peerbooms*)
- C-385/99 (*Müller-Fauré and Van Riet*)
- C-56/01 (*Inizan*)
- C-08/02 (*Leichtle*)
- C-145/03 (*Keller*)
- C-372/04 (*Watts*)
Basic principles of the ECJ rulings

• Social security and health care are competence of Member States but does not preclude respecting Community law.

• Free movement of goods and services applies to health care, regardless of the type of care (in- or outpatient) and the type of coverage (reimbursement – benefits in kind).

• Prior autorisation is an obstacle to free movement.

• Can be justified to:
  1) Preserve the financial equilibrium of the social security system.
  2) Maintain a balanced medical and hospital service and accessible to all.
  3) Maintain medical capacity and expertise on the national territory, essential for public health.

• As far as
  – It is necessary and proportional.
  – The criteria used are objective and non discriminatory.
Patient mobility

<table>
<thead>
<tr>
<th>in-patient care</th>
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</tr>
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<tbody>
<tr>
<td><strong>Smits-Peerbooms</strong>&lt;br&gt;Van Riet/Watts</td>
<td><strong>Kohll-Decker</strong>&lt;br&gt;Müller-Fauré</td>
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- Prior authorisation is justified:
  - Importance of hospital planning to guarantee rationalised, stable, balanced and accessible supply of quality care

- Can only be refused if same or equally effective treatment is available without undue delay in a contracted establishment

- Undue delay: take into account actual medical condition (incl. degree of pain and nature of disability) and medical history

- Prior authorisation is not justified:
  - No spectacular increase of cross-border mobility to be expected
  - Cover remains subject to levels and conditions as defined by the home state

- Member States are allowed to fix reimbursement amounts to which cross-border patients are entitled (provided they are based on objective, non-discriminatory and transparent criteria)
Waiting for Watts  
(C-372/04, 16 May 2006)

- Oct. 2002: Mrs. Watts (72) waiting for hip replacement surgery with the NHS
  - Standard waiting time: 12 months
  - Authorisation for treatment abroad refused
  - Jan. 2003: reprioritised to 3 months wait

- March 2003: Mrs. Watts receives hip replacement in Abbeville (F)
  - Reimbursement refused by NHS Primary Care Trust

- European Court of Justice:
  - A supply of medical services does not cease to be an economic service within the meaning of Article 49 EC on the ground that the patient, after paying the foreign supplier for the treatment received, subsequently seeks the reimbursement of that treatment from a national health service.
  - Waiting lists for managing the available hospital capacity in its territory (clinical prioritisation) should be flexible and dynamic and should not prevent patients to whom treatment required within a medically acceptable period in the light of the patient’s particular condition and clinical needs can not be provided from being authorised to receive hospital treatment in another Member State at the expense of the system with which he is registered.
Patient mobility

**in-patient care**

*Smits-Peerbooms*

*Van Riet/Watts*

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**out-patient care**

*Kohll-Decker*

*Müller-Fauré*

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How to distinguish?
Patient mobility

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How solid is this justification ground?
Patient mobility

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Should I wait or should I go?
## Patient mobility

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**How low can we go?**
High level reflection process on patient mobility and EU healthcare developments (2003)

• More cooperation to better use healthcare resources
• Sharing information on health care
• Improving accessibility and quality
• Reconciling national (health) policies with European (internal market) obligations
  • Improve legal certainty concerning cross-border access

Former Commissioners for health, social affairs and internal market
Assumption of medical costs
(Art. 23 initial draft Directive on services)

• Non-hospital health care:
  – not to be made subject to authorisation if covered under own social security system
  – conditions and formalities apply as in home state (e.g. referral, terms relating to dental care)

• Hospital care
  = medical care which can only be provided in a medical infrastructure:
  – authorisation is allowed if in conformity with general authorisation scheme conditions of the Directive
  – authorisation cannot be refused if:
    • treatment is covered in home state
    • treatment can not be given within a medically justifiable time-limit

• Level of reimbursement: not less than that provided for by own social security system in respect of similar care provided on its territory
<table>
<thead>
<tr>
<th>Art. 19-20</th>
<th>Art. 23 Dir. Services in the IM</th>
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<tbody>
<tr>
<td>new Regulation 883/2004</td>
<td>(free movement of services and goods)</td>
</tr>
</tbody>
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### E111 - Care which becomes medically necessary during their stay: if covered under the delivering-state system

- **Non-hospital health care**: if covered under the home-state system
- **Hospital care**: assumption cannot be refused if:
  - treatment is covered in home state
  - treatment cannot be given within a medically justifiable time-limit

#### “as if (s)he was affiliated in the state delivering treatment”
- Providing state tariff
- Conditions and formalities of the delivering state

#### Financial settlement between States

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#### E112 - prior authorisation cannot be refused if:
- treatment is covered in home state
- treatment cannot be given within a medically justifiable time-limit

#### “as if (s)he received the treatment in the home state”
- Not less than home state tariff
- Same conditions and formalities apply as in home state

#### Payment up-front – ex post facto reimbursement
Regulatory framework for financial coverage of cross-border care

Access to cross-border health care

Art. 23 Services Directive

Bilateral agreements or XB contracts

Regulation 883/2004

Tariffs State of affiliation (home state)

Tariffs State of treatment (host state)
Access to care under Art. 22 Reg. 1408/71 or Art. 49 ECT

Prospective patient
Citizen of EU
Insured/ covered by health care system of home member state seeking cross-border health care

Permitted Under Article 49 EC

Yes

Privately Funded?

No

Authorised by home Member State?
(E112) Reg 1408/71 Art. 22c

Yes

Care necessary during the Stay?

Yes

Authorisation lawfully refused?
or Terms of authorisation scheme lawful

No

Entitled to necessary care Art 22 (a) (E111) Reg. 1408

No

Entitlement under Art 49 EC Treaty?

Entitled to necessary care Art 22 (a) (E111) Reg. 1408

No entitlement in EU law

Source: based on Tamara Hervey, Freedom to provide health care services within the EU: An opportunity for a Transformative Directive (2006)
The initial services Directive and health care

Internal market for services

- Free establishment
  - Mutual evaluation process
    - Prohibited requirements (art. 14)
    - Requirements to be evaluated (art. 15)
  - Cross-border provision
  - Country of origin principle
  - Derogations (art. 16-19)
  - Free provision of services
  - Assumption of health care costs (art. 23)
    - Regulation 883/04 on the coordination of social security systems
    - Use of services abroad
«This is not a liberalisation or privatisation Directive!»

• «It would not change the way Member States choose to organise health and social security systems. It is Member States’ responsibility to decide to what extent and under what conditions private operators, for example private hospitals, may provide services funded by the social security system.»

From: A checklist aiming to correct some myths about the Commission proposal (11 August 2004)
The internal consequences

• “Cross-border care has consequences for all health services, whether provided across borders or not”.

• Internal effects on
  – Managing waiting lists flexibly
  – Provider choice and contracting arrangements
  – Benefit package

• Competition law
“Our health systems are a fundamental part of Europe’s social infrastructure. We do not under-estimate the challenges that lie ahead in reconciling individual needs with the available finances, as the population of Europe ages, as expectations rise, and as medicine advances. In discussing future strategies, our shared concern should be to protect the values and principles that underpin the health systems of the EU.

As Health Ministers in the 25 Member States of the European Union, we invite the European Institutions to ensure that their work will protect these values as work develops to explore the implications of the European Union on health systems as well as the integration of health aspects in all policies.”

Statement on common values and principles in EU health systems
(Health Council, 1 June 2006)
Health care is not a service as any other

« Finding the right balance between competition that stimulates and solidarity that unites. »

(Jacques Delors)
Open method of coordination on health care and care for the elderly

High level group

ECJ rulings 1998-2006

Regulation 883/04

XB projects and contracts

Services Directive

Services general interest

Internal market

Health and social policy

Competition

Health services Directive?